STATE OF MICHIGAN

COURT OF APPEALS

DAVID SMELSER, Personal Representative of the Estate of DORIS SMELSER, Petitioner-Appellee,	UNPUBLISHED February 27, 2014
v	No. 312802 Macomb Circuit Court
DEPARTMENT OF HUMAN SERVICES, Respondent-Appellant.	LC No. 2012-000646-AA

Before: MURPHY, C.J., and M.J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent Department of Human Services (DHS) appeals by leave granted the circuit court's order that granted a motion for peremptory reversal of a decision on reconsideration issued by a DHS hearing referee that had imposed a Medicaid divestment penalty against petitioner Doris Smelser[1] in regard to her eligibility for long-term care benefits and her stay in a nursing home. We affirm.

In order to provide some context and understanding of the underlying nature of this case, we quote the following passage from this Court's opinion in *Mackey v Dep't of Human Services*, 289 Mich App 688, 693-696; 808 NW2d 484 (2010):

> In 1965, Congress enacted Title XIX of the Social Security Act, commonly known as the Medicaid act. See 42 USC 1396 *et seq.* This statute created a cooperative program in which the federal government reimburses state governments for a portion of the costs to provide medical assistance to low-income individuals. Participation in Medicaid is essentially need-based, with

[1] Mrs. Smelser died shortly after the circuit court proceedings were concluded, and her estate is now acting as petitioner-appellee through personal representative David Smelser.

states setting specific eligibility requirements in compliance with broad mandates imposed by federal statutes and regulations.[2]

Like many federal programs, since its inception the cost of providing Medicaid benefits has continued to skyrocket. The act, with all of its complicated rules and regulations, has also become a legal quagmire that has resulted in the use of several "loopholes" taken advantage of by wealthier individuals to obtain government-paid long-term care they otherwise could afford. The Florida District Court of Appeal accurately described this situation, and Congress's attempt to curb such practices:

"After the Medicaid program was enacted, a field of legal counseling arose involving asset protection for future disability. The practice of 'Medicaid Estate Planning,' whereby 'individuals shelter or divest their assets to qualify for Medicaid without first depleting their life savings,' is a legal practice that involves utilization of the complex rules of Medicaid eligibility, arguably comparable to the way one uses the Internal Revenue Code to his or her advantage in preparing taxes. Serious concern then arose over the widespread divestiture of assets by mostly wealthy individuals so that those persons could become eligible for Medicaid benefits. As a result, Congress enacted several laws to discourage the transfer of assets for Medicaid qualification purposes. Recent attempts by Congress imposed periods of ineligibility for certain Medicaid benefits where the applicant divested himself or herself of assets for less than fair market value. More specifically, if a transfer of assets for less than fair market value is found within 36 months of an individual's application for Medicaid, the state must withhold payment for various long-term care services, i.e., payment for nursing home room and board, for a period of time referred to as the penalty period. Medicaid does not, however, prohibit eligibility altogether. It merely penalizes."

. . .

A transfer for less than fair market value during the "look-back" period is referred to as a "divestment," and *unless falling under one of several exclusions*, subjects the applicant to a penalty period during which payment of long-term-care benefits is suspended. [Citations omitted; emphasis added.]

Here, on October 28, 2010, with David Smelser signing as conservator on behalf of his mother Doris Smelser, an irrevocable joinder agreement was executed, creating a subaccount for

[2] This Court noted that "[i]n Michigan, the Department of Community Health oversees the Medicaid program, which the DHS administers pursuant to the Social Welfare Act, MCL 400.1 *et seq.*" *Mackey*, 289 Mich App at 693 n 6.

the benefit of Doris in the Michigan Preservation Trust (MPT), which was a pooled accounts trust administered by Advocacy, Inc. On the same day, $50,895 was deposited into Doris Smelser's MPT subaccount, and a quit-claim deed was also executed, conveying a property in Grayling valued at $9,000 to the trust. The MPT was designed to hold assets that would be exempt under 42 USC 1396p(d)(4) for purposes of calculating the amount of assets held by a person in determining his or her eligibility for Medicaid benefits.[3] Under the Bridges Eligibility Manual (BEM) utilized by DHS, such trusts are referred to as "Exception B, Pooled Trusts." See BEM 260 and 401. On October 29, 2010, Doris Smelser applied for medical assistance, long-term care benefits. Smelser, who had been previously diagnosed with "Alzheimer's Dementia with Depression" and Chronic Obstructive Pulmonary Disease (COPD), began residing in a long-term care facility, MediLodge of Sterling Heights, on August 11, 2010. Doris was 80 years old when she entered the facility and required 24-hour nursing assistance.

On December 9, 2010, DHS made a determination that Smelser's subaccount in the pooled accounts trust, MPT, did not qualify for Exception B trust protection because Smelser was over the age of 65; therefore, DHS concluded that the asset transfer constituted divestment, subjecting Smelser to a divestment penalty. Consistent with BEM 401 and 405 and *Mackey*, DHS explains that Smelser was still found generally eligible for Medicaid, but was subject to a divestment penalty due to the transfer of assets, with the penalty being that Medicaid would not pay for her long-term care services during a penalty period, although other Medicaid covered services would be paid. In petitioner's brief on appeal, it is asserted that $41,222 is owed to the nursing home, which, if not paid by the Medicaid program, will likely be uncollectible as Doris Smelser's estate is insolvent.

On December 15, 2010, Smelser prepared a request for an administrative fair hearing in order to challenge DHS's decision. The request indicated that Smelser was being represented by attorney Michele Fuller. It appears that the hearing request was stamped by the county DHS office on December 27, 2010, yet a hearing summary prepared by DHS indicated that the request was received on January 24, 2011, which perhaps was a reference to receipt by DHS in Lansing. A notice of hearing for March 31, 2011, was sent by DHS to Doris Smelser in care of attorney Fuller at Fuller's office address. A telephone hearing on Smelser's request was conducted on March 31, 2011. We note that, at the hearing, Fuller indicated that the probate court had entered an order approving the planned transfer to the trust after finding that the transfer would be permissible under BEM, regardless of Smelser's age. Attorney Fuller stated that she would fax a copy of the order to the referee and DHS's representative, but the record does not contain the order. In the subsequent circuit court proceeding, petitioner reiterated the events that transpired in probate court prior to the transfer.

[3] "To be eligible for Medicaid long-term-care benefits in Michigan, an individual must meet a number of criteria, including having $2,000 or less in countable assets." *Mackey*, 289 Mich App at 698.

On May 19, 2011, the hearing referee ruled "that Claimant's trust is an 'Exception B, Pooled Trust' and . . . [DHS] erred in applying a 'Divestment Penalty' in determining claimant eligibility under the Medical Assistance Program." In the caption of the written hearing decision, it referred to "Doris Smelser c/o Michelle Fullert [sic]," followed by attorney Fuller's office address. At the end of the hearing decision, a notice indicated that rehearing or reconsideration could be ordered if requested within 30 days. But it further provided that DHS "*will not order* a rehearing or reconsideration on the *Department's* motion where the final decision cannot be implemented within 90 days of the filing of the original request." (Emphasis added.) At that point, the 90-day period had already elapsed. We note that the Bridges Administrative Manual (BAM) 600 (January 1, 2011), Granting A Rehearing/Reconsideration, p 34, allowed for the granting of "a rehearing/reconsideration request if . . . [t]he information in the request justifie[d] it; **and** [t]here [was] time to rehear/reconsider the case and implement the resulting decision within the standard of promptness."[4] (Emphasis in original.) Pursuant to BAM 600 (January 1, 2011), Standard of Promptness, p 5, "[f]inal action on hearing requests, including implementation of the Decision and Order . . ., must be completed within 90 days" of "the date the hearing request was first received by . . . DHS[.]"

Despite the timeframe language in the hearing decision's notice and BAM 600, on June 14, 2011, DHS filed a request for reconsideration of the referee's ruling, arguing that a transfer to an Exception B, Pooled Trust by a person age 65 or older constituted divestment subject to penalty. BAM 600 (January 1, 2011), Local Office Requests, p 33, required notice to be sent to Smelser regarding the reconsideration request. The record contains an unsigned letter dated June 14, 2011, from DHS and addressed to attorney Fuller, indicating that DHS had requested reconsideration. However, the actual address was not Fuller's office address, which, as indicated above, was clearly part of the record, having been used at least twice by DHS to mail the hearing notice and the hearing decision. Rather, the address in the June 14, 2011, letter was Smelser's old address, where she had resided prior to her admission into the nursing home. The record clearly reflected that Smelser was residing in the nursing home at the time of mailing. The letter was supposedly copied to Doris Smelser, but no address was indicated, and, regardless, she was incompetent at that point. Smelser's son, conservator and then personal representative David Smelser, did live at his mother's former address at the time of mailing, but it was claimed that he was prepared to testify that he never received the notice. Also, the letter was not addressed to David. Moreover, the record did not contain any kind of certification or affidavit indicating that the letter was even mailed. Petitioner and counsel claimed that they never received notice of the request. And given the notice in the hearing decision and the language in BAM 600, along with consideration of the passage of time since Smelser made her original request, a reconsideration

[4] Comparable to a motion for reconsideration in the courts under MCR 2.119(F), BAM 600 (January 1, 2011), Local Office Requests, p 34, provided that no responses to rehearing/reconsideration requests were to be reviewed. Contrary to the claims in *amicus curiae* and petitioner's briefs, DHS, generally speaking, was permitted to seek reconsideration or a rehearing. *Id.* ("Department request[s]. . . ."); MCL 24.287(1) ("An agency may order a rehearing in a contested case on its own motion or on request of a party.").

request would not have been expected. DHS's failure to send notice to attorney Fuller, who was representing an incapacitated person, when it had Fuller's address cannot be excused.

On September 15, 2011, a different hearing referee granted the request for reconsideration.[5] Smelser claimed that she was never notified that reconsideration had been granted, and DHS conceded that nothing in the record reflected that Smelser or attorney Fuller was sent or received notification of the grant of reconsideration. And BAM 600 (January 1, 2011), Granting A Rehearing/Reconsideration, p 34, mandated that when a reconsideration request was granted, DHS had to "send written notice of the decision to all parties to the original hearing." Four months later, on January 12, 2012, which was more than one year after Smelser filed her request for a fair hearing, a reconsideration ruling vacating the original decision was dropped on an unsuspecting Smelser and Fuller. The referee, the third one involved in the case, found that DHS had established that the transfer to the trust constituted divestment subject to penalty, given that Exception B trusts require a person to be under 65 years old at the time of transfer and Smelser was over 65.

On February 12, 2012, Smelser filed a petition in the circuit court for judicial review of the reconsideration ruling, alleging that DHS, under the standard of promptness, had been required to make a final administrative decision within 90 days of her request for a hearing. She argued that DHS violated the standard by requesting reconsideration after 79 days had passed since the end of the 90-day period, by granting reconsideration after 172 days had passed since the end of the period, and by rendering the reconsideration decision after 291 days had passed since the 90-day period's conclusion. Smelser also maintained that she was not afforded notice of the request for and granting of reconsideration, that the transfer to the trust did not constitute divestment, and that she was entitled to attorney fees. Smelser claimed that DHS's actions violated federal regulations, the BEM, and constitutional due process protections, and that the reconsideration decision was made upon unlawful procedure, was not supported by competent, material, and substantial evidence, amounted to a material error of law, and was arbitrary, capricious, and an abuse of discretion. Smelser also filed a motion for peremptory reversal, raising solely the procedural issues regarding notice and the standard of promptness.

The circuit court granted Smelser's motion for peremptory reversal, finding manifest error. In the court's opinion and order, the court concluded that Smelser had been deprived of her due process rights to notice of DHS's request for reconsideration and to have an opportunity to be heard at a hearing. Therefore, according to the circuit court, DHS effectively lost its right to request reconsideration, "making peremptory reversal rather than remand the proper remedy." DHS filed a motion for reconsideration, which the court denied. The circuit court, however, did modify its reasoning a bit for granting the motion for peremptory reversal. The court backtracked on its previous conclusion that Smelser was denied her right to a hearing, given that the matter was in the context of reconsideration, but it now found that DHS failed to comply with

[5] The grant merely allowed reconsideration proceedings to continue; there was no substantive reconsideration decision entered at the time.

the standard of promptness by not issuing a final agency decision in a timely manner. The court also repeated its prior finding that Smelser was not provided notice of DHS's request for reconsideration, "undermin[ing] the goal of achieving promptness and finality in agency determinations." DHS appeals by leave granted.

"This Court reviews an administrative decision according to the same limited standard as does the circuit court." *Hicks v Dep't of Commerce*, 220 Mich App 501, 504; 560 NW2d 54 (1996). In *Monroe v State Employees' Retirement Sys*, 293 Mich App 594, 607-608; 809 NW2d 453 (2011), this Court, quoting *Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996), recited the standard:

> "[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review . . . . As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made."

In the context of a motion for peremptory reversal, our review is identical to the circuit court's review, which entails examination of DHS's "final order for error so manifest as to warrant peremptory reversal of its decision." *Hicks*, 220 Mich App at 505; see also MCR 7.110; MCR 7.211(C)(4). A court should grant a motion for peremptory reversal only in "those cases in which the law is settled and no factual assessment is required." *Hicks*, 220 Mich App at 509 (internal quotation marks and citation omitted).

In 42 USC 1396a(a)(3), a statute concerning Medicaid benefits, it is indicated that "[a] State plan for medical assistance must . . . provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." A state Medicaid agency "must be responsible for maintaining a hearing system" that meets "the due process standards set forth in *Goldberg v Kelly*, 397 US 254[; 90 S Ct 1011; 25 L Ed 2d 287] (1970), and any additional [federal] standards[.]" CFR 431.205(a) and (d). The *Goldberg* Court held that due process requires an opportunity to be heard at a meaningful time and in a meaningful manner, timely and adequate notice detailing any reasons for terminating benefits, a chance to confront and cross-examine adverse witnesses, an opportunity to present supporting arguments and evidence, and a ruling by a decisionmaker on eligibility for benefits that is solely grounded on the applicable legal rules and evidence adduced at the hearing. *Goldberg*, 397 US at 267-271. CFR 431.244(f)(1), a federal regulation regarding Medicaid services, medical assistance programs, and fair hearing procedures for Medicaid applicants, provides in relevant part that a state agency "must take final administrative action . . .[,] ordinarily, within 90 days from the . . . date the enrollee filed an . . . appeal[.]" Although participation by the states in the Medicaid "program is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services[.]" *Wilder v Virginia Hosp Ass'n*, 496 US 498, 502; 110 S Ct 2510; 110 L Ed 2d 455 (1990).

Michigan's Social Welfare Act, MCL 400.1 *et seq*., provides for the promulgation of rules by DHS's director, pursuant to the Administrative Procedures Act (APA), MCL 24.201 *et seq*., governing the conduct of Medicaid-related hearings. MCL 400.9(1). These rules must "provide adequate procedure for a fair hearing of appeals and complaints, when requested in writing by the state department or by an applicant for or recipient of, or former recipient of, assistance or service, financed in whole or in part by state or federal funds." *Id.* As indicated above, BAM 600 (January 1, 2011), Standard of Promptness, p 5, provided that "[f]inal action on hearing requests, including implementation of the Decision and Order . . ., must be completed within 90 days" of "the date the hearing request was first received by . . . DHS[.]" As also indicated earlier, BAM 600 (January 1, 2011), Granting A Rehearing/Reconsideration, p 34, allowed for the granting of "a rehearing/reconsideration request if . . . [t]he information in the request justifie[d] it; **and** [t]here [was] time to rehear/reconsider the case and implement the resulting decision within the standard of promptness." (Emphasis in original.) Michigan Administrative Code, R 400.917(3), which controls administrative hearing decisions in Medicaid cases, provides that "[a] decision shall be issued within 90 days of the request for a hearing, unless otherwise provided by governing state or federal law." The APA indicates that "[a] final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record[.]" MCL 24.285.

The rule that can be extracted from the maze of authorities referenced above, as best we can ascertain, is that a hearing referee must render a decision, on an original request for a hearing or on reconsideration, generally within 90 days of the original request or within 90 days of when the request was received by DHS, or at least within a reasonable period. Here, the January 12, 2012, reconsideration decision was not made within the 90-day window, and we also hold that the decision was not entered within a reasonable period of time, given that it was more than a year after Smelser requested a hearing and no reason or explanation was provided for the delay. The question then becomes determining the repercussions of the violation, where none of the authorities setting a timeframe for decision expressly provide for any sanction or penalty.

In *Dickinson v Daines*, 15 NY3d 571, 575-576; 940 NE2d 905; 915 NYS2d 200 (NY App, 2010), the New York Court of Appeals faced the issue posed to us and ruled as follows:

> The parties have cited no case, and we know of none, in which a time limit or other procedural requirement imposed on an administrative agency by its own regulation was held to be mandatory. It would certainly be unusual, if not impossible, for an administrative agency so to deprive itself of power that the Legislature conferred upon it. Indeed, petitioner here is not really arguing that the time limit is "mandatory" in the sense that . . . it renders "every administrative decision void" that is not made within 90 days. If that were true, petitioner would lose the case, because the Commissioner's original decision after the fair hearing—the decision in petitioner's favor—was rendered after 90 days had expired. In any event, to take the time limit as a jurisdictional barrier to action would make no sense. It would allow the Commissioner, merely by delaying his decision more than 90 days, to nullify the right of applicants for Medicaid to fair hearings.

> The real question here is not whether the regulation is "mandatory" in the sense of depriving the agency of power to act when it is violated, but what the consequences of a violation are. Petitioner, perhaps wary of seeking too broad a holding, has not suggested a rule that would answer this question. A theoretically possible rule is that, when a decision after a fair hearing is not timely issued, the party requesting the fair hearing (i.e., the party seeking benefits) wins automatically. But that rule would be draconian, potentially very expensive for the State and unfair to agencies, like DSS here, that would suffer the consequences of delays that were not their fault. It seems unlikely that the Legislature has even empowered the Commissioner to impose such severe consequences as the result of bureaucratic delays; but assuming that he has that power, we see no sign that the Commissioner intended, by adopting the regulatory 90–day time limit, to exercise it.
>
> Another theoretically possible rule would be that, where the 90–day time limit is violated, reconsideration of a decision favorable to the applicant is barred. But this rule, though less drastic than the applicant-always-wins rule, has little to recommend it. DOH regulations provide that the Commissioner "may review an issued fair hearing decision for purposes of correcting any error found in such decision," and impose no time limit on the review. To prohibit review where the original decision was late would be an arbitrary restriction, without support in any statutory or regulatory text, that would needlessly prevent the Commissioner from correcting errors by his subordinates.
>
> We thus reject any view of the 90–day time limit that would render invalid the action taken by the Commissioner here. In doing so, we do not necessarily hold that the time limit is "merely directory" in the sense [that it is] . . . a guideline with which DOH "should seek to comply." DOH does not argue that violations of the time limit have no consequences at all. On the contrary, it acknowledges that the time limit may be enforced by a lawsuit to compel the issuance of a decision. The Commissioner also points out that the federal government may cut off the State's Medicaid funds if the state program is not administered in accordance with federal requirements. And finally, the Commissioner acknowledges that . . . a petitioner may obtain relief even under a merely directory procedural requirement if she shows "that substantial prejudice resulted from the noncompliance." This petitioner has shown no such prejudice. On the contrary, as the case reaches us, she has effectively conceded that she is not, and never was, entitled to receive Medicaid benefits. [Citations omitted.]

There is some logic in the New York court's reasoning, considering that, like the original ruling in favor of the petitioner in *Dickinson*, the original May 19, 2011, decision here that was in Smelser's favor was issued more than 90 days after DHS's receipt of Smelser's hearing request, even using the January 24, 2011, receipt date noted in the hearing summary. But petitioner is of course not arguing that DHS lacked the authority to enter that decision. On the other hand, in *Dickinson*, there was no time limit set for issuing a decision upon reconsideration, where in the case at bar, BAM 600, pp 5 and 34, imposed the same 90-day limit tied to the

original hearing request even in the context of reconsideration. Further, *Dickinson* was not burdened with the notice failures involved here, and our petitioner certainly does not concede that Smelser was never entitled to the long-term care benefits at issue.

In *Dep't of Consumer & Indus Servs v Greenberg*, 231 Mich App 466; 586 NW2d 560 (1998), the Board of Optometry Disciplinary Subcommittee temporarily suspended the appellant's license, placed him on probation, fined him, and required him to perform community service, after finding that he lacked good moral character. An administrative complaint had been filed against the appellant for assaulting female employees. *Id.* at 468. The appellant, citing MCL 333.16232(3), argued "that the complaint against him should have been dismissed because the subcommittee violated the requirement that it meet and impose a penalty on appellant within sixty days after receiving the hearing referee's proposal for decision." *Id.* This Court found that the statutory section did not provide for dismissal of a complaint when the subcommittee was tardy, that there was no statutory sanction for a violation, and that the statutory scheme contemplated that delays would occur in the disciplinary process. *Id.* at 468-469. The *Greenberg* panel concluded that under the circumstances the timeframe was permissive in nature despite being framed in mandatory terms and that the timeframe was primarily a guideline. *Id.* The Court held "that the passage of more than sixty days, especially in the complete absence of any specific allegations of prejudice suffered by appellant, did not require dismissal of the complaint." *Id.* at 469.

In *Dep't of Community Health v Anderson*, 299 Mich App 591, 593-594; 830 NW2d 814 (2013), an administrative complaint was filed against the respondent for negligent and incompetent veterinary practices, and, upon establishment of the complaint, various disciplinary measures were imposed against the respondent. The respondent argued that certain statutory timelines were not satisfied; therefore, the matter should have been dismissed. *Id.* at 600. The timelines required disciplinary action to be completed within one year after the initiation of the investigation, and they also required the imposition of a penalty by the disciplinary subcommittee within 60 days of receipt of the hearing examiner's findings and conclusions. *Id.* at 600-601. This Court employed the principles and reasoning from *Greenberg* and rejected the request for dismissal. *Id.* at 601-602.

While we agree that *Greenberg* and *Anderson* support a conclusion that DHS's violation of time restrictions alone does not warrant peremptory reversal of the referee's reconsideration decision, we nonetheless affirm the circuit court's ruling, given all of the particular circumstances in this case, which did not exist in *Greenberg* and *Anderson.* Here, the time restrictions for a final decision were not only violated, there was egregious noncompliance, where Smelser was not provided a final decision until more than one year after her hearing request was made, and no excuse for the delay was provided. This alone is not sufficient to distinguish our case from *Greenberg* and *Anderson.* But when the extensive and inexcusable delay is coupled with the fact that the original hearing decision itself contained language that absolutely precluded reconsideration given the expired 90-day period and the fact that Smelser was not afforded notice of both the reconsideration request and grant, we are compelled to conclude that manifest error occurred when the reconsideration ruling was issued in January 2012. "Due process requires fundamental fairness[.]" *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). Given that DHS commenced reconsideration proceedings contrary to state

and federal timeframes *and* the original hearing decision and that DHS failed to provide notice of the reconsideration request and the grant of reconsideration, we conclude that DHS effectively precluded itself or was equitably estopped from obtaining a decision on reconsideration; the original hearing decision must stand. Peremptory reversal was the proper remedy.

Affirmed. Having fully prevailed on appeal, we award taxable costs to petitioner pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause